1957

Farmers Grain Cooperative v. Earl Fredrickson : Brief of Appellant

Utah Supreme Court

Bullen & Olson; Howell, Stine and Olmstead; Attorneys for Appellants;

No. 8701

IN THE SUPREME COURT
of the
STATE OF UTAH

FARMERS GRAIN COOPERATIVE,

Plaintiff and Appellant

vs.

EARL FREDRICKSON,

Defendant and Respondent

Appellant's Brief

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A. W. WOODY PRINTING CO., OGDEN, UTAH

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STATUTES

IN THE SUPREME COURT
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FARMERS GRAIN COOPERATIVE,

Plaintiff and Appellant

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BRIEF OF APPELLANT

STATEMENT OF FACTS

The defendant in 1953 contracted with plaintiff to raise five thousand (5,000) turkeys on its feed. He executed a note and mortgage on the birds to secure the advances of feed. Defendant received approximately five thousand and forty (5,040) birds from H. J. Bonie Company of Ogden, Utah, but paid for only forty nine hundred (4,900). The birds were brooded at Trenton, Utah by Jay Hodges. They were delivered in two batches, thirty nine hundred and twenty (3,920) on April 11, and eleven hundred and twenty (1120) on April 14th.

Approximately a week or so after delivery, defendant

began incurring abnormal death losses in the flock. The birds showed evidences of protruded vents, diarrhea, and picking had also broken out. The birds at this time were being fed on Farmers Grain crumbles. One Grant Leonard, the salesman of plaintiff, who made the contractural arrangements with defendant, was contacted, as well as Amie Bonie, the poult salesman. Leonard suggested the introduction of terramycin into the drinking water in an attempt to remedy the condition. On April 22, 1953, six of the poults were sent also to Utah State University for examination, diagnosis and recommendation. Dr. Miner of the University, was of the opinion that the poults were suffering from a vitamin B deficiency, and recommended the use of milk products. See defendants exhibit No. 8. The letter from Dr. Miner to Mr. Hodges was dated May 2, 1953. There was a conflict in the evidence as to whether Leonard had knowledge of Dr. Miner's recommendation and insisted nevertheless on the use of terramycin. After being on terramycin for about a week, the birds were put on a milk products diet. They continued to die for sometime after, but subsequently the death rate subsided. Seven Hundred and Twelve (712) birds were lost by defendant's own count in the brooder house. At about five (5) weeks of age, the birds were moved to colony houses from the brooder. No unusual loss was sustained in the colony houses.

From the time the birds were moved on to the range until processing, defendant lost another three hundred and ninety (395) birds by his own count. No analysis

was made of any of the birds after they went on to the range. No analysis was ever made at any time of any of the feed. The defendant's total loss by his own count and that of his brooder, therefore amounted to eleven hundred and seven (1107) birds.

The project did not pay out. Plaintiff subsequently brought an action to foreclose on the note and the mortgage. Defendant counterclaimed alleging breach of warranty and negligence with respect to nutritional deficiencies in the feed. He claimed damages (1) in the sum of Thirty Six Hundred ($3,600.00) Dollars for the poults that died, (2) in the sum of Forty One Hundred and Two 92/100 ($4,102.92) Dollars for the loss of weight on the birds that did not die, (3) in the sum of Fifty Three Hundred and Nine and 76/100 ($5,309.76) Dollars for extra amounts of feed necessary to bring the remaining birds to maturity. The lower court subsequently dismissed additional causes of action contained in the counterclaim as not stating proper items of damage.

The matter was tried to a jury before the Honorable Lewis Jones. A special verdict with interrogatories was submitted to them upon which they returned in favor of the defendant upon his counterclaim as follows:

As to item Number One	$3,500.00
As to Item Number Two	3,779.00
As to item Number Three	5,039.76

The jury found for the plaintiff on its note and mort-

gage for feed in the sum of $5,309.33. The court subsequently allowed $750.00 as and for attorneys fees on the note sued upon.

Plaintiff at the close of the evidence moved for a directed verdict on the grounds of insufficiency of the evidence. The motion was overruled without argument. Thereafter, pursuant to Rule 59 U.R.C.P., this motion was coupled with a motion for a new trial and argued to the court. At that time defendant consented to a reduction in the verdict as to the item of damage relating to the birds that died, from $3,500.00 to $1,698.00.

Both motions were subsequently denied and judgment was entered after findings in the sum of $10,516.76 in favor of the defendant on his counterclaim and $5,309.33 in favor of plaintiff on its note and mortgage. This appeal was then taken.

STATEMENT OF POINTS

POINT I.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE INFERENCE THAT THE FEED WAS DEFICIENT AND PROXIMATELY CAUSED DEFENDANT'S DAMAGE. THE COURT ERRED IN THE ADMISSION OF CERTAIN TESTIMONY.

POINT II.

THE PLAINTIFF WAS PREJUDICED BY THE DEFENDANT'S ATTEMPT TO GET THE QUESTION OF INSURANCE COVERAGE BEFORE THE JURY.

ARGUMENT

POINT I.

THE EVIDENCE WAS INSUFFICIENT TO JUSTIFY THE INFERENCE THAT THE FEED WAS DEFICIENT AND PROXIMATELY CAUSED DEFENDANT'S DAMAGE. THE COURT ERRED IN THE ADMISSION OF CERTAIN TESTIMONY.

The defendant's evidence when boiled down was based upon the following:

1. Testimony from all the other turkey growers who received poults from the same two hatches involved, and who were on feed other than Farmers Grain. They all testified that their poults were in good condition upon delivery, the conditions under which their poults were brooded, their mortalities, none of which were apparently exorbitant, and their weights at processing, which they considered to be within the range of normal weights. The two hatches were not distinguished as between growers, however (Tr. 49). In order to make such testimony admissible, it is necessary to lay a sufficient foundation to the end that collateral issues will not be raised. Such evidence is evidence by comparison. The items of place, use, care, etc. cannot be so materially different as to raise collateral issues. See the collection of cases in 66 A.L.R. Page 86. It to us appears impossible to declare that the evidence elicited from these growers was sufficiently similar so as to afford a valid comparison. Keith Jacobs (Trs. 36, et seq.) lives in Pleasant Grove. His poults were delivered by Bonie's delivery truck to his coop. He brooded 5,000 and a custom brooder

the balance of the flock of 8,000. They were brooded and ranged in the vicinity of Pleasant Grove. He did not recall his mortality other than being normal. No comparisons at all were afforded from any of his testimony. LeGrande Anderson resides at Koosharem, Utah. (Tr. 65 Et seq.). He rented a brooder at Marysvale, Utah, and ranged them at Koorsharem. Howard Green (Tr. 76, et seq.), lives at American Fork. His birds were delivered by truck and brooded at American Fork. There was no evidence as to the location of his range. Edmund Bills (Tr. 165 et seq.) lives at Salmon, Idaho. His birds were shipped express to Pocatello and delivered from there by car. They were brooded under his direction there. There was no testimony as to his range.

The court finally recognized that perhaps some foundation should be laid when the witness Bills was testifying. (Tr. 168). However, we question the foundation that was laid.

We submit that by the very nature of things, all this evidence was inadmissible and led to collateral issues with each grower because of the dissimilarity as to conditions and the extreme range of geographical locations.

2. Testimony from the poult supplier confirming the delivery of the poults to all the growers concerned and reciting the conditions under which each group was brooded. His testimony was that all the flocks were brooded and ranged under different conditions, that no identical condition prevailed in any group of growers.

However, according to the observations he made, the methods employed by each individual grower would bring about satisfactory results. (Tr. 42 et seq.)

3. The testimony of the brooder Mr. Hodges added nothing in the way of affirmative proof. (Tr. 169 et seq.). He testified as to an ununiform condition in size of the crumbles, the condition that set in among the poults and the abnormal death loss. He further stated that he thought his stoves were working properly, and that the lighting conditions were ideal.

4. The testimony of the defendant himself was concerned with the details of the deaths and the amounts of damage and added nothing in the way of affirmative proof. (Tr. 82 et seq.).

5. The witness Wilson testified as to some complaints with respect to Farmers Grain feed in 1953 and 1954, and was allowed over objection to testify as to complaints he had himself about Farmers Grain feed which was being fed to his turkeys.

The plaintiff was highly prejudiced by this testimony of the witness Wilson, which was given when he was recalled as a witness by the defendant. (Tr. 212-214). He had testified previously (Tr. 204-205) that he was requested by plaintiff to assist in rectifying some complaints as to ununiform crumbles in 1953, and as to a collection of fines in the bins which found their way into certain sacks of feed in 1954. Upon recall he was asked and permitted to answer over repeated objections as to complaints he made to Farmers Grain Cooperative

about feeds being fed to his turkeys. The matter of the ununiformity of crumbles was already before the jury from the testimony of the witness Hodges (Tr. 173). The matter of fines in the bins in the year 1954 did not relate to the period in question, and was of no probative value. The testimony elicited did not even relate to a particular time, but the witness was nevertheless allowed to answer as to complaints he made to the feed manager on his feed and as to the condition of his turkeys. The matter of complaints was gone into again by defendant with the witness Leonard called by defendant pursuant to Rule 42 (Tr. 247-251). The tenor of all this examination with respect to complaints was within the rule, res inter alios acta and was not admissable. See annotation in 66 A.L.R. supra.

6. Dr. Miner, head of the Department of Veterinary Science at Utah State University, examined six of the defendant's poults and rendered a written report. These poults were submitted to his department on or about April 22, 1953. He testified as to the conditions of these poults after examination and autopsy. They were, in his opinion, suffering from vitamin B deficiency, but which vitamin in the complex he could not determine. He stated on cross examination that according to his report nutritional conditions are the result of perhaps one of four reasons, (1) insufficient intake of food, (2) lack of proper nutrients in the feed, (3) interference of absorption of nutrients in the intestinal tract by chemicals or bacterial growth, and (4) that the nutrients were in a form not readily utilized. He was further

asked a hypothetical question over objection, that ruled out everything but the feed (Tr. 229-230). He answered that if all the poults came from one hatch, were transported and raised under the same conditions, to the age of 12 weeks, and only one group showed a deficiency, it would point toward a lack of nutrients in the feed. On recross when further questioned concerning his report he was asked if he could testify from his examination of the poults that the deficiency could definitely be attributed to the feed. He answered that since his information was limited to the examination of poults and since he did not see the flock prior to or after the examination, and since no analysis of the feed was available, the answer was no (Tr. 234-235).

The hypothetical question put to Dr. Miner which we do not set out here because of its length (Tr. 229) was asked without proper foundation being laid and was improperly phrased. It says the same thing in effect as "if the feeds were deficient, what would cause the condition in the poults." The question obviously answers itself. It is submitted that the testimony of Dr. Miner at best stands for no more than that the feed could have been deficient.

7. Dr. Draper, the last witness called by the defendant is in charge of the poultry department at the Utah State University. He was asked based upon Dr. Miner's testimony, if he had an opinion as to whether the trouble in the defendant's turkeys was a deficiency in the feed. He made no analysis of the feed, had no

knowledge of the operation or management of the flock and had never seen any of the birds, but was nevertheless allowed to answer over objection that provided there were adequate feed space, feed hoppers, it would point to a vitamin B deficiency. No sufficient foundation was laid for this testimony, and its reception was error. (Tr. 237-242).

This court had a feed case before it fairly recently, *Park vs. Moorman Manufacturing Company,* 121 Utah 339, 241 P. 2d 914. In that case the plaintiff raised poultry for egg production. He had laying hens in coops on each side of a highway. The same feed had been used in both coops. The defendant induced plaintiff to try its feed, which he did in one coop. Egg production subsequently dropped off in that coop. The birds became thinner and picking broke out. Defendant's veterinarian found the birds to be suffering from malnutrition. The birds in the other coop, of the same age and from the same hatch, continued on normally. This court held the evidence sufficient to justify the inference as to proximate cause. The opinion indicates that there were witnesses who had used defendant's feed and had had undesirable results. Defendant's veterinarian testified that the feed could have caused the loss. Whether the results obtained by the witnesses who had used the feed were the same experienced by the plaintiff is not indicated, but it must have been so. The comparison between the two coops, however, would appear forceful.

In the instant case, the expert testimony availed of

was of the opinion that the birds were suffering from a vitamin B deficiency. There was no evidence as to any other poults on plaintiff's feed which suffered from Vitamin B deficiency during the period in question. There was no evidence adduced of a vitamin complaint from any other grower who had used Farmers Grain feed at any time. There was no evidence adduced from any one else on Farmers Grain feed that year who had had undesirable results. The only evidence as to complaints was as to an ununiformity in the size of the crumbles and a collection of fines in a bin in 1954. The jury, incidentally, returned an answer that the feed was also protein deficient. Upon what basis they did is hard to see, since there was no testimony that the poults were suffering from a protein deficiency. There was some evidence as to a mistake in formulation resulting in a 43% protein concentrate instead of a 50% protein concentrate that was delivered to the witness Wilson some time in February of 1953, according to the witness Skeen who was superintendent of the feed mill at the time. (Tr. 293-294) (See also Tr. 247-248, witness Leonard).

POINT II.

THE PLAINTIFF WAS PREJUDICED BY THE DEFENDANT'S ATTEMPT TO GET THE QUESTION OF INSURANCE COVERAGE BEFORE THE JURY.

In the cross-examination of Wilford Young (Tr. 11 et seq.), counsel for the defendant was interrogating the witness as to charges made against the defendant, as evidenced by plaintiff's Exhibit No. 3, the ledger

card covering defendant's account. Counsel subsequently noted the charge of $250.00 thereon for an insurance premium. This was a hazard insurance policy covering loss of the flock thru casualty. The premium had been paid by plaintiff and in turn charged back to the defendant, as evidenced by the ledger. However, counsel went further and asked if there were any other insurance on these turkeys or the account. Objection was made but was overruled and the court specifically asked the witness if there were any other insurance (Tr. 24). The witness answered revealing a products liability coverage. Plaintiff subsequently moved for a mistrial (Tr. 31). The Court by its ruling threw the whole field of insurance open. The attempt to interject the item of coverage was so obvious that any one would be completely naive to deny that it was apparent.

The Exhibit No. 3 was the ledger sheet controlling defendant's account. There were no sums listed thereon which were not labeled as to what they were for. There was no reason to ask the question. Later in argument on plaintiff's motion for a directed verdict and for a new trial (Tr. 443) counsel advanced the reason that the question was asked to find out if the plaintiff was charging products liability coverage to the defendant. The idea that such a type of coverage is or would be charged to a customer directly is ridiculous and furnishes the weakest of reasons to support such a line of inquiry.

This court has had this question before it in four previous cases, *Balle vs. Smith,* 81 Utah 179, *Reid vs. Owens,* 98 Utah 50, *Morrison vs. Perry* 104 Utah 139,

104 Utah 151 On Rehearing *Gittens vs. Lundberg,* 3 Utah 2d, 392. None of these cases are exactly in point factually with the instant case, but all of them recognize and condemn the bad faith or overzealous attempt to get the question before the jury.

It is true that without solicitation by defendant the fact of coverage was injected inadvertently as a part of plaintiff's case from the testimony of the witness Leonard (Tr. 358-359). However, it is difficult to see how this cures the error, since the question of coverage was already firmly imbedded in the jury's mind. If the jury had been discharged in the first instance, the later aversion to coverage as a part of the Plaintiff's case would not have occurred. Plaintiff feels it was highly prejudiced by the conduct of counsel and the ruling of the court.

CONCLUSION

It is submitted there was no evidence to support the verdict. The case should be reversed or in the alternative sent back for a new trial.

Respectfully submitted,

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